

**United States Department of Labor
Employees' Compensation Appeals Board**

C.Y., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Kissimmee, FL, Employer**

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**Docket No. 20-0144
Issued: August 18, 2021**

Appearances:

*Joanne M. Wright, representative for appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On October 23, 2019 appellant, through his representative, filed a timely appeal from a July 10, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the July 10, 2019 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met his burden of proof to expand the acceptance of the claim to include additional lower extremity conditions causally related to his accepted March 21, 2014 employment injury.

FACTUAL HISTORY

On March 26, 2014 appellant, then a 52-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on March 21, 2014 he sustained injury to his neck, shoulders, hands, low back, and feet when bending/twisting his body to handle mail while in the performance of duty. OWCP assigned File No. xxxxxx919.⁴ On April 22, 2014 he claimed that the acceptance of his claim should include several lower extremity conditions causally related to his March 21, 2014 work activities, including bilateral degenerative conditions of both knees, ankles, and feet.

Appellant submitted a March 25, 2014 report from Dr. Samy F. Bishai, a Board-certified orthopedic surgeon, who opined that appellant sustained several medical conditions due to his March 21, 2014 employment activities, including internal derangement of the right and left knee joints, and internal derangement of the right and left ankles and feet. Dr. Bishai also found that on March 21, 2014 appellant aggravated preexisting conditions of his cervical spine, shoulders, upper extremities, and lumbar spine. In duty status reports (Form CA-17) dated March 25 and April 22, 2014, he indicated that appellant's diagnoses were due to the reported March 21, 2014 injury and found that he was totally disabled.

By decision dated May 21, 2014, OWCP accepted the occurrence of the March 21, 2014 employment incident. However, it determined that appellant had not met his burden of proof to submit sufficient medical to establish a neck, shoulder, upper extremity, back, or lower extremity condition causally related to the March 21, 2014 employment activities, as alleged.

On May 29, 2014 appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review. During the hearing held on January 5, 2015, he discussed the work duties that he believed caused his claimed employment injuries. By decision dated February 10, 2015, OWCP's hearing representative set aside OWCP's May 21, 2014 decision and remanded the case to OWCP for further development, to be followed by issuance of a *de novo* decision. He found that the reports of Dr. Bishai were sufficient to require that appellant be referred for a second opinion examination to determine whether he sustained a new injury or aggravated a previously accepted injury on March 21, 2014. The hearing representative indicated that the second opinion examiner should, as part of his or her evaluation of employment-related conditions, provide an

⁴ OWCP had previously accepted under File No. xxxxxx575 that appellant sustained a traumatic injury on June 21, 2007 in the form of left shoulder tendinitis. It also had previously accepted under File No. xxxxxx546 that he sustained a traumatic injury on November 26, 2012 in the form of permanent aggravation of the conditions of left rotator cuff tear, left shoulder impingement, internal derangement of both shoulders, cervical disc syndrome, and lumbar disc syndrome. Appellant filed other claims, which are now closed due to inactivity, including: a claim accepted for a December 31, 1999 left shoulder sprain (assigned File No. xxxxxx335); a claim accepted for occupational left shoulder tendinitis sustained by June 8, 2000 (assigned File No. xxxxxx872); and a claim accepted for September 20, 2005 thoracic and neck strains (assigned File No. xxxxxx800). OWCP administratively combined OWCP File Nos. xxxxxx919, xxxxxx575, xxxxxx546, xxxxxx335, xxxxxx872, and xxxxxx800, with File No. xxxxxx919 designated as the master file.

assessment of appellant's bilateral upper extremities from the tops of his shoulders to the tips of his fingers, his bilateral lower extremities from his hips, down to his knees, ankles, feet, and toes, and spine from his neck down to his tailbone area.

On remand, OWCP referred appellant on February 23, 2015 for a second opinion examination with Dr. Richard C. Smith, a Board-certified orthopedic surgeon. It provided Dr. Smith with a statement of accepted facts (SOAF) and the entire case record, including documents from all of appellant's claims that had been consolidated under the master file, File No. xxxxxx919. In a February 23, 2015 document, bearing OWCP File No. xxxxxx919, OWCP requested that he evaluate whether appellant sustained additional conditions related to his employment duties, including those performed on March 21, 2014, other than those already accepted by OWCP in connection with his prior claims. In particular, it directed Dr. Smith to provide "an assessment on the claimant for bilateral upper extremities from the tops of his shoulders to the tips of his fingers, for bilateral lower extremities of his hips, down to his knees, ankles, feet, and toes, and for the spine -- neck down to tailbone area." Moreover, OWCP instructed Dr. Smith to provide "an opinion with supporting rationale as to whether a medical connection (by way of causation or aggravation) exists between the claimant's postal employment and any condition(s) diagnosed."⁵

In a February 26, 2015 report, Dr. Smith reported the findings of the physical examination he performed on appellant's cervical spine, shoulders, upper extremities, back, and lower extremities. He diagnosed cervical syndrome, subacromial impingement, disorder of lumbar disc, and neck, shoulder, and low back pain. In a March 3, 2015 report, Dr. Smith responded to the questions OWCP posed in its February 10, 2015 letter, regarding appellant's permanent impairment. He determined that appellant had five percent permanent impairment of his left upper extremity and seven percent permanent impairment of his right upper extremity under the sixth edition of the A.M.A., *Guides*.

By decision dated August 10, 2015, under OWCP File No. xxxxxx919, OWCP accepted that on March 21, 2014 appellant sustained permanent aggravation of left shoulder tendinitis, permanent aggravation of internal derangement of both shoulders, permanent aggravation of left shoulder impingement, permanent aggravation of left rotator cuff tear, permanent aggravation of cervical disc syndrome, and permanent aggravation of lumbar disc syndrome.

By decision dated January 22, 2016, OWCP found that appellant had not met his burden of proof to expand the acceptance of his claim to include additional conditions causally related to the accepted March 21, 2014 employment injury. It found that the opinion of Dr. Smith, the

⁵ The record also contains a February 10, 2015 document, bearing OWCP File No. xxxxxx546, in which OWCP posed questions to Dr. Smith regarding appellant's permanent impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009). OWCP intended the referral to Dr. Smith to address both appellant's schedule award claim, initially addressed under File No. xxxxxx546, and OWCP's hearing representative's instruction, made in the February 10, 2015 decision, that further development be carried out under File No. xxxxxx919, regarding which employment-related conditions should be accepted. The issue of appellant's permanent impairment is not currently before the Board.

OWCP referral physician, demonstrated that appellant did not sustain employment-related lower extremity conditions on March 21, 2014.⁶

On August 15, 2016 OWCP referred appellant for a second opinion examination to Dr. Jonathan Black, a Board-certified orthopedic surgeon. It requested that he evaluate whether appellant continued to have residuals of his accepted March 21, 2014 employment injury. In an August 31, 2016 report, Dr. Black determined that the cervical, shoulder, and low back conditions accepted as occurring on March 21, 2014 had resolved and that appellant's underlying conditions in these regions had returned to their baseline states.

On December 21, 2016 appellant, through his representative, requested reconsideration of the January 22, 2016 decision denying the expansion claim. The representative argued that Dr. Smith failed to answer the questions posed by OWCP in its February 23, 2015 referral document and; therefore, did not adequately address appellant's claim that he sustained several lower extremity conditions on March 21, 2014.

By decision dated March 16, 2017, OWCP denied modification of its January 22, 2016 decision. It again found that the opinion of Dr. Smith demonstrated that appellant did not sustain employment-related lower extremity conditions on March 21, 2014.

On March 8, 2018 appellant requested reconsideration of the March 16, 2017 decision.

Appellant submitted a June 7, 2017 report from Dr. Hoi V. Do, a Board-certified pain management physician, who opined that appellant sustained employment-related lower extremity conditions other than those already accepted, including internal derangement of both knee joints, torn medial meniscus of the right knee joint, degenerative arthritis of the right knee joint, torn medial meniscus of the left knee joint, degenerative arthritis of the left knee joint, internal derangement of both ankle joints, sprains of the anterior talofibular ligaments of both ankle joints, and tenosynovitis of the peroneus longus and brevis tendons of the left ankle/foot. Dr. Do opined that these conditions were caused by the repetitive duties of appellant's job, including the repetitive knee bending he performed on March 21, 2014.

In reports dated between September 29, 2017 and February 28, 2018, Dr. Bharatkumar D. Patel, a Board-certified neurologist, discussed the neurological conditions affecting appellant's neck and upper and lower extremities. In reports dated August 18, 2017 through January 12, 2018, Dr. Sydel Legrande, a Board-certified family medicine physician, addressed appellant's collective complaints of cervical, bilateral shoulder, back, and bilateral knee pain.

By decision dated May 11, 2018, OWCP denied modification of its March 16, 2017 decision.

In a June 12, 2018 report, Dr. Conrad D. Tamea, a Board-certified orthopedic surgeon, reported that on March 21, 2014 appellant experienced the sudden worsening of chronic overuse syndrome from his work as a mail carrier for 27 years. He advised that appellant was required to frequently bend, stoop, and kneel as a result of his new job assignment and noted, "This was the

⁶ OWCP indicated that on August 5, 2015 it received a supplemental report of Dr. Smith of unspecified date, but the consolidated case record does not contain a copy of such a report.

culmination of a repetitive stress injury resulting in exacerbation of symptoms of internal derangement of both knees including tear of medial meniscus, osteoarthritis of his right knee, and tear of the medial meniscus of his left knee.” Dr. Tamea further indicated that appellant was required to bend and stoop with heavy objects throughout his entire 27 years of working, resulting in a repetitive overuse stress to both knees that reached its culmination on March 21, 2014.

On August 2, 2018 OWCP referred appellant for a second opinion examination with Dr. William Dinenberg, a Board-certified orthopedic surgeon. It requested that he evaluate whether appellant continued to have residuals of his accepted employment injuries. In an August 17, 2018 report, Dr. Dinenberg determined that appellant continued to have residuals of his accepted employment-related cervical, shoulder, and back conditions.

On April 27, 2019 appellant, through his representative, requested reconsideration of the May 11, 2018 decision. Appellant submitted a January 7, 2019 report in which Dr. Tamea summarized appellant’s visits between January 23, 2018 and January 7, 2019. The report discussed the contents of the previously submitted June 12, 2018 report of Dr. Tamea.

By decision dated July 10, 2019, OWCP denied modification of its May 11, 2018 decision.

LEGAL PRECEDENT

When an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.⁷ The medical evidence required to establish causal relationship between a specific condition and the employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁸

The Board has held that, when the medical evidence supports an aggravation or acceleration of an underlying condition precipitated by working conditions or injuries, such disability is compensable.⁹ However, the normal progression of untreated disease cannot be stated to constitute “aggravation” of a condition merely because the performance of normal work duties reveals the underlying condition.¹⁰

ANALYSIS

The Board finds that this case is not in posture for decision.

⁷ *J.R.*, Docket No. 20-0292 (issued June 26, 2020); *W.L.*, Docket No. 17-1965 (issued September 12, 2018); *V.B.*, Docket No. 12-0599 (issued October 2, 2012); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

⁸ *See E.J.*, Docket No. 09-1481 (issued February 19, 2010).

⁹ *C.H.*, Docket No. 17-0488 (issued September 12, 2017).

¹⁰ *Id.*

In this case, OWCP initially referred appellant for a second opinion examination with Dr. Smith and instructed him to provide a comprehensive and specific evaluation of multiple body regions and to produce an opinion on all conditions casually related to appellant's work duties, including those performed on March 21, 2014.¹¹ While it subsequently accepted several cervical, shoulder, and back conditions, appellant requested that the accepted conditions be expanded to include several lower extremity conditions, including bilateral knee, ankle, and foot conditions.¹² OWCP relied on Dr. Smith's opinion in denying appellant's alleged conditions regarding his expansion claim.

The Board finds, however, the case requires further development of the medical evidence because the February 26 and March 3, 2015 reports resulting from the referral to Dr. Smith are in need of clarification. Dr. Smith failed to provide any response to the questions posed by OWCP in the February 23, 2015 referral document. As noted, OWCP instructed Dr. Smith to provide a comprehensive evaluation of multiple body regions and identify all conditions causally related to appellant's work duties, including those performed on March 21, 2014. Dr. Smith's reports did not adequately follow these instructions, but rather focused on evaluating the permanent impairment of appellant's upper extremities, an issue which is not currently before the Board.¹³

The Board has held that, while the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹⁴ Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.¹⁵ Once OWCP starts to procure medical opinion, it must do a complete job in securing from its referral physician an opinion which adequately addresses the relevant issues.¹⁶

¹¹ In a February 23, 2015 referral document, OWCP directed Dr. Smith to provide "an assessment on the claimant for bilateral upper extremities from the tops of his shoulders to the tips of his fingers, for bilateral lower extremities of his hips, down to his knees, ankles, feet, and toes, and for the spine -- neck down to tailbone area." Moreover, it instructed Dr. Smith to answer several questions and provide an opinion on all medical conditions related to appellant's employment duties, including those performed on March 21, 2014. OWCP also provided Dr. Smith with a February 10, 2015 referral document, which posed various questions regarding permanent impairment. Therefore, the referral to Dr. Smith had a dual purpose, *i.e.*, evaluating all employment-related conditions sustained by appellant, as well as evaluating any permanent impairment related to such conditions.

¹² At the time of the referral to Dr. Smith, the case record contained reports in which Dr. Bishai, an attending physician, opined that appellant sustained several conditions, including internal derangement of the right and left knee joints, and internal derangement of the right and left ankles and feet due to his March 21, 2014 work activities.

¹³ The Board further notes that, after the referral to Dr. Smith, appellant continued to submit medical evidence from attending physicians which was supportive of his expansion claim. In a June 7, 2017 report, Dr. Do opined that appellant sustained several bilateral knee and ankle conditions due to his repetitive work duties, including the repetitive knee bending he performed on March 21, 2014. In a June 12, 2018 report, Dr. Tamea opined that appellant's job activities on March 21, 2014 caused a sudden worsening of his bilateral knee condition and represented "the culmination of a repetitive stress injury resulting in exacerbation of symptoms of internal derangement of both knees including tear of medial meniscus, osteoarthritis of his right knee, and tear of the medial meniscus of his left knee."

¹⁴ See *D.V.*, Docket No. 17-1590 (issued December 12, 2018); *Russell F. Polhemus*, 32 ECAB 1066 (1981).

¹⁵ See *A.K.*, Docket No. 18-0462 (issued June 19, 2018); *Robert F. Hart*, 36 ECAB 186 (1984).

¹⁶ *T.B.*, Docket No. 20-0182 (issued April 23, 2021); *L.V.*, Docket No. 17-1260 (issued August 1, 2018); *Mae Z. Hackett*, 34 ECAB 1421, 1426 (1983).

The case must therefore be remanded for clarification from Dr. Smith as to whether appellant sustained medical conditions, other than those already accepted, due to his employment duties, including those performed on March 21, 2014. He should indicate whether the accepted conditions should be expanded to include the several lower extremity conditions claimed by appellant as employment related. If Dr. Smith is unable to clarify or elaborate on his previous reports, or if the supplemental report is also vague, speculative, or lacking rationale, OWCP must submit the case record and a detailed SOAF to another second opinion physician for the purpose of obtaining a rationalized medical opinion on the issue.¹⁷ After this and such other further development as deemed necessary, OWCP shall issue a *de novo* decision on this issue.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the July 10, 2019 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: August 18, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

¹⁷ *J.H.*, Docket No. 19-1476 (issued March 23, 2021); *R.O.*, Docket No. 19-0885 (issued November 4, 2019); *Talmdge Miller*, 47 ECAB 673 (1996).